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In The

SUPREME COURT OF THE UNITED STATES

2010 Term

GAYLE EVERETT PATRICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari
To The Ninth Circuit Court of Appeals

JEREMY S. YELLIN
P.O. Box 564
Havre, MT 59501
Ph. (406) 265-3303
Counsel of Record for Gayle Everett Patrick

QUESTIONS PRESENTED

A. Can a search warrant stand based upon the uncorroborated, unverified bold assertion of a lay person?

B. Can a sentence of nine (9) years imprisonment for a seventy-one (71) year old first-time offender based upon minimal evidence stand?

PARTIES TO THE PROCEEDINGS IN THE NINTH CIRCUIT

1. The United States of America - Plaintiff/Appellee/Respondent

2. Gayle Everett, Patrick - Defendant/Appellant/Petitioner

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GAYLE EVERETT PATRICK

Petitioner,

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PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner, Gayle Patrick, respectfully prays that a writ of certiorari issue to review the Ninth Circuit Court of Appeals Memorandum entered on February 17, 2010.

OPINIONS BELOW

The Ninth Circuit Court of Appeals unpublished Memorandum of February 17, 2010, is reproduced as Appendix A.

JURISDICTION

The final decision of the Ninth Circuit Court of Appeals was entered on February 17, 2010. This Petition for Certiorari is filed within ninety (90) days of that decision. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this petition as to the first basis for granting review is:

1. The Fourth Amendment to the United States Constitution:

> The Fourth Amendment decrees, in pertinent part, that 'no Warrants shall issue, but upon probable cause, supported by Oath affirmation, and particularly describing the place to be searched and the persons or things to be seized.'

There are no statutory provisions involved in this petition as to the second basis for granting review.

STATEMENT OF THE CASE

A. Procedural Summary and Basis for Jurisdiction in the Federal Courts:

The District Court had jurisdiction over this case in accordance with Article III, Section 2, Clause I of the United States Constitution and 18 United States Code 2244(a)(1), because Petitioner was indicted on one (1) count of receipt of child pornography in violation of 18 United States Code Section 2252A(a)(2), one (1) count of possession of child pornography in violation of 18 United States Code Section 2252A(a)(5)(B), and a forfeiture count pursuant to 18 United States Code Section 2253(3)(a)

A jury trial commenced on December 1, 2008.

On December 4, 2008, the jury found Mr. Patrick guilty.

The District Court filed and entered its Judgment, as required by Rule 32 of the Federal Rules of Criminal Procedure, on March 12, 2009.

Mr. Patrick filed his Notice of Appeal on March 17, 2009.

The Ninth Circuit Court of Appeals had jurisdiction over the appeal under Rule 32 of the Federal Rules of Criminal Procedure and 18 U.S.C. §3742(a)(2).

The Ninth Circuit Court of Appeals issued an unpublished opinion denying the relief Petitioner sought on February 17, 2010. (Appendix A).

B. Facts:

Based upon the say so of one (1) citizen informant, law enforcement suspected Mr. Patrick committed the offense of §45-5-625(1)(e), M.C.A.[1]

---

[1]

45-5-625. Sexual abuse of children.

(1) A person commits the offense of sexual abuse of children if the person:

(e) knowingly possesses any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or stimulated.

. . .

(5) As used in this section, the following definitions apply.

(b) 'Sexual conduct' means:

(I) actual or simulated:

(A) sexual intercourse, whether between persons of the same or opposite sex;

(B) penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure;

(C) bestiality;

(D) masturbation;

(E) sadomasochistic abuse;

(F) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person; or

Without verifying any of the information provided by a citizen informant, local law enforcement sought the issuance of two (2) search warrants from the Phillips County Justice of the Peace, apparently in order to seize two (2) computers alleged to be owned by Mr. Patrick.

In each of the two (2) applications for search warrants, authored by Phillips County Sheriff Tom Miller, the only probable cause asserted for his belief is stated as follows:

> Affiant has probable cause to believe that the records, documents, and all other items to be searched for and seized are located at the above location for the reasons set forth below in this paragraph. On May 12, 2008, Bill Scheffelmaer was completing repair work on the computer of Gayle Patrick at the above location. Scheffelmaer saw what he described as pictures of young children engaged in sexual activities. Scheffelmaer estimated that the children so depicted were younger than sixteen years of age.

(G) defecation or urination for the purpose of the sexual stimulation of the viewer; or

(ii) depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

Both of these applications state:

> Computer evidence is vulnerable to inadvertent or intentional modification or destruction (from external sources and from destructive code imbedded in the system as a 'booby trap').
> . . .
>
> It is very easy for a computer user to conceal data or other types of digital evidence through a number of methods, including the use of innocuous or misleading filenames and extensions. For example, files with the extension .jpg are customarily accepted as digital file names. However, a moderately sophisticated computer user can change the .jpg file extension to .txt or dll to conceal the data.

Although somewhat confusing, both of these search warrant applications appear to seek:

> . . . permission to search and seize certain electronic data processing and storage devices, computers, and computer systems that may contain any or all of the records and information identified above. These items may include central processing units; file servers; self-contained laptop, palmtop or notebook computers, PDAs; digital cameras, cellular telephones, internal and peripheral storage devices such as fixed disks, external hard disks, any form of floppy disk, tape drives, and tapes, CDs, DVDs, optical storage devices, memory sticks, compact flash media, or other memory storage devices; dongles or encryption keys; scanning devices; peripheral input/output devices such as keyboards, printers, video display monitors, optical readers, and

> related communications devices such as modems; wireless access devices; or any storage media; together with system documentation, operating logs and documentation, software, passwords, and instruction manuals.

According to the first application, the affiant has "probable cause to believe that evidence of this crime is located at 532 South Third Street East, Malta, Montana, which is the business location of Scheffelmaer, who informed me the computer is located at this address."

According to the second application, the affiant has "probable cause to believe that evidence of this crime is located at 4927 HWY 363, Malta, Montana, which is the residence of Gayle Patrick. Scheffelmaer stated that he went to the Patrick residence located in Phillips County, Montana, and recalls seeing a laptop computer in addition to the e-machine. Further, Scheffelmaer stated the e-machine computer contained a cd disc drive capable of displaying pornographic pictures and videos."

Again, although somewhat confusing, in each search warrant it appears that law enforcement was given the following authority to search the respectively described property:

> You, or any agent acting at your direction, are therefore commanded, forthwith, and within ten (10) days from the issuing date of this warrant, at any time of the day or night, to serve this warrant and make a search of the above-described premises for the property specified above, and, if the property is found there, seize it, give a receipt for it, prepare a written inventory verified by you of the property seized and bring the property before me, all in the manner provided by law. Furthermore, the search and seizure of the above records is

According to a law enforcement report, the search warrants were served upon Mr. Scheffelmaer and Mr. Patrick respectively, on May 13, 2008, in Phillips County.

During the execution of the search warrant at Mr. Patrick's residence, alleged statements by Mr. Patrick were made, including the alleged statement he was aware inappropriate items were on his computer (e-Machine), the items could be deleted and that like images would be found on his laptop computer. It does not appear that Miranda warnings were given.

The items seized, including two (2) computers, were to be delivered to a forensic analyst, Jimmy Weg, in Helena, Montana.

According to Mr. Weg's report, the seized items were delivered to him in Helena, Montana, on May 24, 2008, and he indicates he began analyzing these items at the end of May, 2008.

Mr. Weg searched the e-Machine as a result of an additional search warrant authorized by Lewis and Clark County District Court Judge Jeffrey Sherlock.

The application for this search warrant contained the same general information as the two (2) earlier applications but also contained the following language:

> When Miller served the search warrant at Patrick's home on May 13, 2008, Patrick volunteered that he was aware that inappropriate images were on the e-Machines computer. Patrick told Miller that Scheffelmaer could delete the graphics if it was necessary. In reply to Miller's question, Patrick said that the laptop computer also contained similar graphics and that the images belonged to Patrick.

This affidavit contained the same language as the previous two (2) applications concerning booby trapping the computer and hidden data.

At the suppression hearing, Sheriff, Tom Miller testified on direct examination that Mr. Scheffelmaer explained to him the images he saw were of "very young girls in sexual acts, and some were fully undressed."

Miller went on to state:

> I don't know if he used specific words to describe exactly what he saw. We didn't go into great detail of exactly what he seen image-for-image. He only looked at a couple of them, and then he backed out of the system.

On cross-examination, Sheriff Miller conceded that he did not do any investigation related to the claims made by Mr. Scheffelmaer and did not investigate Mr. Scheffelmaer.

Sheriff Miller also stated although he was aware that the jurisdiction of Justice of the Peace, who issued the two (2) search warrants, extended only to Phillips County, he allowed the computers to be brought to Helena, Montana.

As it related to the e-Machine the District Court ruled:

> With regard to the so-called e-Machine, there is evidence before the court that there was a firsthand view of what was described as child pornography, children engaged in sexual acts, by a person who physically observed the images. That is not hearsay.

That is first hand knowledge. By this record, Mr. Scheffelmaer was a reliable person. There is nothing in this record to suggest that he had reason to fabricate the presence of this information. What he saw was physically visible to him by this record.

Therefore, we are working here with information that is based upon firsthand knowledge, a personal view of this sort satisfies this court that a rational person, which is what Mr. Scheffelmaer is described by this record to be, would recognize what he saw. And clearly, it would be contrary to Mr. Scheffelmaer's penal interest for him to lie about what he had seen to falsely claim the presence of child pornography on a piece of equipment that was in his shop for repair purposes.

The District Court also did not suppress the evidence resulting from the actual search of the e-machine in Helena, Montana.

In so ruling the District Court stated:

. . . we have, and the person seeking the warrant had valid information related to the initial seizure. There was evidence from the record that the defendant had acknowledged the presence of images on that particular piece of equipment. That information was available at the time that the second search warrant was sought and obtained.

I find that there was ample probable cause for issuance by Judge Sherlock of the second search warrant for search of the content of the e-Machine. And therefore, the motion to suppress the fruits of

the search of the e-Machine is denied in its entirety.

The District Court did suppress all evidence derived from the search of the laptop computer.

The District Court also suppressed all statements made by Mr. Patrick to law enforcement occurring on May 13, 2008.

> But out of an abundance of caution, and given that the court has determined that the seizure of the laptop computer is out of this case, I am similarly ordering that any references to communications with the defendant that occurred on May 13 are out of this case, as well.
> The government will not be allowed to rely during its case-in-chief upon any declarations made by the defendant in the May 13, 2008, encounter with law enforcement.

At the trial of this matter, Mr. Scheffelmaer testified that he worked on an e-Machine obtained from Mr. Patrick.

He further testified that he found several folders containing what he thought was child pornography in the "my documents" folder of this e-Machine.

On cross-examination, Mr. Scheffelmaer conceded there were four (4) user accounts on this e-Machine.

Sheriff Miller testified on direct examination to his contact with Mr. Scheffelmaer.

On cross-examination the undersigned began to ask questions concerning Sheriff Miller's affidavits in support of his application for search warrants.

Although the undersigned was able to elicit testimony from Sheriff Miller that individual files of child pornography can be mislabeled or hidden to evade detection, the District Court, upon objection by the United States, barred further inquiry.

Specifically, while the United States objected on grounds of relevance, the District Court stated ". . . counsel, this issue that you're asking about now has been addressed and resolved before trial. The objection is sustained."

Computer expert witness Jimmy Weg also testified.

He testified that when he examined the e-Machine he found 2,823 images of child pornography.

He also testified that the root of all of the files was the Grandpa Patrick user name account.

Further, Mr. Weg stated:

1. He found four (4) user accounts;

2. All of the accounts required a password ;

3. "Grandpa Patrick" or someone who logged on as "Grandpa Patrick" could take administrative action with respect to the computer system.

On cross-examination, Mr. Weg testified that:

1. Three (3) of the accounts were password protected including "Grandpa Patrick," "Jessica's hot stuff" and "Justin's and Sam's";

2. Booby trapping to him was when a computer is rigged with explosives;

3. The folders containing various names were not hidden;

4. The folders were easy to find in a forensic;

5. Passwords are fairly common and he has a password on his computer;

6. Out of the approximately 2,800 images of child pornography, he did not find JPG images listed as TXT or DLL; and

7. There were no folders that were mislabeled.

At the close of the evidence the District Court denied Mr. Patrick's motion for a directed verdict pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

The undersigned also made a record of the basis for his questioning of Sheriff Miller:

> Your Honor, essentially, Sheriff Miller made some statements in his affidavit in support of his search warrant for Mr. Scheffelmaer's - - to get the computer, the Hitachi e-Machine, from Mr. Scheffelmaer's place of business. In that application, he talked about situations where people who possess child porn sometimes will destroy or hide the image. And that's what I was getting at, Your Honor, through the cross-examination. And I just wanted to explain that to the court.

In response the District Court stated:

> Yes. I understand, I think, and did at the time counsel, understand the basis for your inquiry. But the reality is that issues related to the validity of this search warrant and the search and seizure as a result of it, were addressed in pretrial motions. And the court ruled in advance of the commencement of this trial that there were no impediments to the introduction of the evidence received from the results of that search.
>
> And that, in the view of the court, covered the matter.

Although Mr. Patrick was a seventy-one (71) year old, first time offender, who lived a productive life, including providing public service, was listed as a low risk re-offender, and had a psycho-sexual treatment provider available, the District Court sentenced Mr. Patrick to a nine (9) year prison sentence (out of a maximum of ten (10) years).

REASONS FOR GRANTING WRIT

A. The Ninth Circuit Court of Appeals Allowed a Search Warrant to Stand Based Upon the Uncorroborated, Unverified, Bald Assertion of a Lay Person.

In an unpublished decision, the Ninth Circuit Court of Appeals decided that a search warrant without corroboration or verification by a lay person should stand.

In an unpublished decision, the Ninth Circuit Court of Appeals stated:

> The application for the search warrant indicated that the computer technician had observed on Patrick's computer 'pornographic pictures of children involved in sexual acts.' ER 99. The warrant application continued, 'Scheffelmear saw what he described as pictures of young children engaged in

> sexual activities. Scheffelmear estimated that the children so depicted were younger than sixteen years of age.' ER 100. The warrant application described conduct that falls within the statutory definition of 'sexually explicit conduct.' 18 U.S.C. § 2256(2)(A). Accordingly, the affidavit in this case met both of the Battershell requirements and was sufficient to demonstrate probable cause.

This case is compelling because Mr. Patrick, a seventy-one (71) year old with no criminal record whatsoever, is sitting in prison as a consequence of an unconstitutional search and seizure.

B. The Ninth Circuit Court of Appeals Decided It Was Appropriate to Sentence a Seventy-One (71) Year Old First-Time Offender to Nine (9) Years Imprisonment Based Upon Minimal Evidence.

This case is compelling because an elderly, first time offender received an extremely harsh, nine (9) year sentence on weak evidence.

There was no evidence demonstrating that Mr. Patrick knowingly possessed the child pornography.

While the United States' expert testified that the images were stored in the Grandpa Patrick files, he also testified that anyone using the Grandpa Patrick password could access these images, and there were three (3) other user accounts on this computer.

This case is compelling because Mr. Patrick essentially received a life sentence on weak evidence.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals in this matter.

DATED this 2nd day of June, 2010.

JEREMY S. YELLIN
Counsel of Record for
Gayle Everett Patrick,
Petitioner

APPENDIX

APPENDIX A MEMORANDUM* OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 17, 2010

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-30113

D.C. No. CR-08-105-GF-SEH

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

GAYLE EVERETT PATRICK,
Defendant - Appellant.

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted February 4, 2010
Seattle, Washington

Before: W. FLETCHER and RAWLINSON, Circuit Judges, and LASNIK,** Chief District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert S. Lasnik, United States Chief District Judge for the Western District of Washington, sitting by designation.

Gayle Everett Patrick appeals his jury conviction and sentence for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Patrick's home computer contained over 2,800 images of child pornography, which were initially discovered by a computer repair technician who reported what he saw to local law enforcement.

On appeal, Patrick contends that the search warrants for his computer were not supported by probable cause. This court has explained, "To withstand review, we must determine that the warrant application made a sufficient showing that there was probable cause for the magistrate to believe that the pictures likely to be found on [the defendant's] computer depicted: (1) sexually explicit conduct; and (2) a minor engaged in that conduct" United States v. Battershell, 457 F.3D 1048, 1051 (9th Cir. 2006). In this case, the computer technician informed law enforcement that he personally observed images on Patrick's computer of "very young girls in sexual acts, and some were fully undressed." ER 234. The application for the search warrant indicated that the computer technician had observed on Patrick's computer "pornographic pictures of children involved in sexual acts." ER99. The warrant application continued, "Scheffelmear saw what he described as pictures of young children engaged in sexual activities. Scheffelmear estimated that the children so depicted were younger that sixteen years of age." ER 100.

The warrant application described conduct that falls within the statutory definition of "sexually explicit conduct." 18 U.S.C. § 2256(2)(A). Accordingly, the affidavit in this case met both of the Battershell requirements and was sufficient to demonstrate probable cause.

Patrick complains that the technician's report was uncorroborated and unreliable. Corroboration was not required under the circumstances because the technician's report was based on first-hand knowledge and reliable. Because the citizen informant did not provide his information anonymously, he could have been subject to prosecution if he was untruthful, which supports a find of reliability. Battershell, 457 F.3d at 1052. Moreover, there were no inconsistencies in the technician's report, no evidence of any motive to lie, and no evidence of other issued that should have caused the officers or the justice of the peace who issued the warrant to questions his veracity. Although Patrick complains that the technician's description of what he saw was insufficiently detailed and the warrant application failed to attach copies of the pornographic images, neither additional description nor attachment of copies was required because the images depicted pornographic conduct. See, e.g., United States v. Hurt, 795 F.2d 765,722 (9th Cir. 1986), as amended, 808 F.2d 707,708 (9th Cir. 1987) ("Any rational adult person can recognize sexually explicit conduct engaged in by children under the age of 16 when he sees it.");

Battershell, 457 F.3d at 1053 (explaining that "failing to include a photograph in a warrant application is not fatal to establishing probable cause;" "a judge may properly issue a warrant based on factual description of an image."). Therefore, the warrant application to seize the computer was supported by probable cause. Although Patrick contends that the warrant application to search its contents was also deficient, that contention is based on the same argument set forth above and fails for the same reasons. In addition, by that point, Patrick had made incriminating admissions that the child pornography images on the computer were his. The warrants were supported by probable cause.

Patrick also argues that the district court erred in refusing to allow him to cross-examine the local sheriff regarding his statement in the warrant application that people who possess child pornography can hide images and "booby trap" the computer to avoid detection. However, the topic was well beyond the scope of direct examination and was undisputedly not relevant to the sheriff's bias or motivation. In addition, the district court permitted Patrick to briefly cross-examine the government's forensic examiner regarding the same issue. The testimony elicited from both witnesses was sufficient to permit Patrick to later argue this theory to the jury. Accordingly, the district court did not err.

Patrick also contends that there was insufficient evidence to convict him of knowingly possessing child pornography. However, there was ample evidence to convict: at trial, Patrick stipulated that 2,823 images of child pornography were found on his computer, that those images had traveled in interstate or foreign commerce via the Internet, and theat he was the owner of the computer. Moreover, there was evidence that only Patrick had access to the password-protected files on the computer where the pornographic images were located.

Although Patrick contends that his sentence was too long for a seventy-one-year-old first-time offender, Patrick's sentence was not unreasonable give the number and nature of the images and his refusal to accept responsibility. The district court also appropriately considered the advisory Sentencing Guidelines and the 18 U.S.C. § 3553(a) factors.

AFFIRMED.